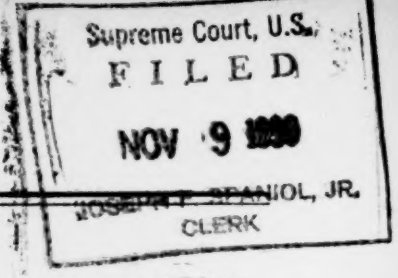
90-613

No.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TRANSPORTATION MANAGEMENT & CONSULTING, INC., LANDAF SHIPPING, LTD., POLYKYN NAVIGATION

BLACK CRYSTAL COMPANY, INC. - - Petitioner

versus

UNITED KENTUCKY BANK, YOUSSEF ALI HASSANAIN, FIRST NATIONAL BANK OF LOUISVILLE - - - - - Respondent

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK J. SANDLIN
Counsel of Record

PATRICK E MORGAN
JAMES M. McDONOUGH
MORGAN AND POTTINGER, P.S.C.
601 West Main Street
Louisville, Kentucky 40202
(502) 589-2780
Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals properly apply the standards set forth by this Court under Fed. R. Civ. P. 56, in affirming the District Court's grant of summary judgment to the Respondent?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iii
Statement of the Case	1– 2
Facts	2– 3
Reasons for Denying Writ of Certiorari	3– 6
Conclusion	6– 7
Appendix	1a–24a

TABLE OF AUTHORITIES

Cases: PAGE

Matsushita Electric Industrial Company, Ltd. v. *Zenith Radio*, 475 U.S. 574 (1986) 5

Celotex Corporation v. *Catrett*, 477 U.S. 317 (1986). 5

Anderson v. *Liberty Lobby Incorporated*, 477 U.S. 242 (1986) 4, 5

Blakeman v. *Mead Containers*, 779 F. 2d 1146 (6th Cir. 1985) 4, 5

Smith v. *Hudson*, 600 F. 2d 60 (6th Cir. 1979) 5

Magnum Import Company v. *Coty*, 262 U.S. 159, (1923) 6

Statutes Under Rules:

Fed. R. Civ. P. 56(c) 5, 6

Sup. Ct. R. 10.1 .....3, 5, 6

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TRANSPORTATION MANAGEMENT & CONSULTING, INC., LANDAF SHIPPING, LTD., POLYKYN NAVIGATION

BLACK CRYSTAL COMPANY, INC. - - - *Petitioner*

v.

UNITED KENTUCKY BANK, YOUSSEF ALI HASSANAIN, FIRST NATIONAL BANK OF LOUISVILLE - - - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The criteria governing grants of Writs of Certiorari observed by this Court show that the Petition for Writ of Certiorari (the "Petition") filed herein should be denied.

STATEMENT OF THE CASE

This case began in 1982 when Transportation Management Consulting, Inc., Landaf Shipping, Ltd., and Polykyn Navigation, brought an action against Black Crystal Company, Inc. (Petitioner), United Kentucky Bank ("UKB"), and Youssef Ali Hassanain ("Hassanain"). On July 30, 1982, Black Crystal filed its Third Party Complaint against First National Bank of Louisville (Respondent)

and Bank of California International, New York ("Bank of California").

All causes of action by and among the various parties were either resolved by dismissal, judgment or settlement, except for the Third-Party Complaint of Petitioner against Respondent. On May 16, 1988, the United States District Court for the Western District of Kentucky ("District Court"), entered its Order granting Respondent's Motion for Summary Judgment against Petitioner and denying Petitioner's Motion for Summary Judgment against Respondent.

On June 15, 1988, Petitioner filed its Notice of Appeal in this matter. Thereafter, Petitioner embarked on a course of missed deadlines before the Sixth Circuit Court of Appeals ("Sixth Circuit"), culminating in a dismissal of the Appeal on January 12, 1989. The Appeal was reinstated on March 16, 1989. Thereafter the issues were fully briefed, and the parties presented arguments orally to the Sixth Circuit.

The Sixth Circuit, on May 1, 1990, upheld the District Court's grant of Summary Judgment in favor of Respondent. On June 15, 1990, the Sixth Circuit denied the petition for rehearing *en banc* filed by the Petitioner.

FACTS

Due to the Petitioner's convoluted statement of the facts contained in pages 13-35 of its Petition, the Respondent regrets that it cannot accept the Petitioner's statement of facts; nor can the Petitioner specifically identify each and every perceived misstatement of fact contained throughout the Petition. The Petitioner has commingled legal arguments, legal conclusions, and misstatements of fact in its attempt to accurately set forth a statement of facts in this

matter. For example, the Petitioner identifies United Kentucky as the "negotiating bank" (Petition pp. 15, 21), however, the *uncontroverted* testimony from the officer of the United Kentucky Bank is that it *never* was the negotiating bank. This fact was found by and set forth in the opinions of the District Court and the Sixth Circuit. (Respondent's Appendix, pp. 3a, 23a, 24a). The Petitioner concurs with the facts as set forth by the District Court and the Sixth Circuit. In order to accurately set forth the facts of this case, the opinions rendered by the District Court and the Sixth Circuit are contained in the Respondent's Appendix to this brief.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioner Has Not Satisfied Any of the Special Criteria Set Out in Supreme Court Rule 10 for Grant of a Writ of Certiorari.

Supreme Court Rule 10.1 provides that a grant of a petition for writ of certiorari is not a matter of right, but a matter of judicial discretion that will only be granted when there are special and important reasons. The Petitioner has no special and important reason for its Petition. The three primary reasons for the granting of a writ of certiorari are as follows:

A. The United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter or has decided a federal question in a way in conflict with the state court of last resort.

B. A state court of last resort has decided a federal question case in a way to conflict with the decision of another state court of last resort or of the United States Court of Appeals.

> C. A state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.
>
> Sup. Ct. R. 10.1

The Petitioner has failed to demonstrate any of the above reasons for a grant of its Petition.

A. The Sixth Circuit Properly Applied the Standard for Summary Judgment in Affirming the District Court's Decision in Favor of Respondent.

Relying on *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Sixth Circuit found no support for the Petitioner's claim that "facts are immensely in dispute" even when "viewed in the light most favorable to the party opposing the motion" (Respondent's Appendix pp, 3, 4).

The Sixth Circuit's standard in deciding whether summary judgment was proper in favor of the Respondent was:

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether is it so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-252 (1986).

Moreover, the Sixth Circuit's decision quoted *Blakeman* v. *Mead Containers*, 779 F. 2d 1146 (6th Cir. 1985) by holding that:

> [O]n a Motion for Summary Judgment, the movant has the burden of showing *conclusively* that there exists no genuine issue as to any material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the Motion. 779 F. 2d at 1150, quoting

Smith v. *Hudson*, 600 F. 2d 60, 63 (6th Cir.), *Cert. dismissed*, 44 U.S. 986 (1979).

The Sixth Circuit's interpretation of Fed. R. Civ. P. 56 is not in conflict with past decisions of this Court. The Sixth Circuit specifically based its holding on the summary judgment standard set out in *Anderson*. There is no conflict in the standards enumerated by this Court in Fed. R. Civ. P. 56 motions. *Matsushita Electric Industrial Company, Ltd.* v. *Zenith Radio*, 475 U.S. 574 (1986); *Anderson*, 477 U.S. 242 (1986); and *Celotex Corporation* v. *Catrett*, 477 U.S. 317 (1986).

B. This Case Does Not Involve a Federal Question Decision Which Conflicts with the Decision of Another State Court of Last Resort or of a United States Court of Appeals as Specified in Section B of Supreme Court Rule 10.1.

A federal question is defined under 28 U.S.C. § 1257(3) as some title, right, privilege, or immunity that is specially set out or claimed under the constitution, treaties or statutes of the United States. This case does not involve an issue of federal law, a treaty or a constitutional question. In contrast, other recent Supreme Court cases involving the issue of summary judgment have contained specific federal questions which were in conflict among court jurisdictions. For example, *Matsushita* involved the federal Sherman Anti-Trust Act, and *Anderson* dealt with the First Amendment question regarding defamation. The present case contains no federal questions, no constitutional questions, and no questions involving a split of authority between the Federal Circuit Courts of Appeal. The case is a simple commercial case devoid of the criteria set forth in Supreme Court Rule 10.1.

CONCLUSION

The Petition should be denied. The jurisdiction conferred upon this Court to review cases on certiorari was not intended to give the defeated party another hearing. "Certiorari jurisdiction is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to cure uniformity of decision." *Magnum Import Company* v. *Coty*, 262 U.S. 159, 163 (1923). The strict criteria governing certiorari policy set out in Supreme Court Rule 10.1 must be enforced since the issues argued by the Petitioner do not involve special and important conflicts among the courts and do not involve federal questions.

The Petitioner incorrectly frames the issue to involve letters of credit when in reality it simply involves the well settled standards for summary judgment. The Petitioner attempts to convince this Court that this case is too complex to be appropriate for summary judgment by submitting a petition that contains irrelevant material, shies away from uncontradicted facts, and proposes red herrings as genuine issues. As the District Court recognized, the Respondent had the obligation to pay only upon presentation of a draft, in conformity with the Credit. The Petitioner has failed to make a sufficient showing of this essential element to its case.

The Sixth Circuit followed Fed. R. Civ. P. 56(c) consistent with established standards for summary judgment

set forth by this Court. Accordingly, the Petition should be denied.

By:_____

MARK J. SANDLIN
Counsel of Record

PATRICK E. MORGAN
JAMES M. MCDONOUGH
MORGAN & POTTINGER, P.S.C.
601 West Main Street
Louisville, Kentucky 40202
(502) 589-2780
Counsel for Respondent

APPENDIX

NOT FOR PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5650

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TRANSPORTATION MANAGEMENT & CONSULTING, INCORPORATED;
LANDAF SHIPPING LIMITED;
POLYKYN NAVIGATION, - - - - - - *Plaintiffs*

v.

BLACK CRYSTAL COMPANY, INC., - - - - - - - *Defendant, Third Party-Plaintiff, Appellant,*
UNITED KENTUCKY BANK;
YOUSSEF ALI HASSANAIN, - - - - - *Defendants,*
FIRST NATIONAL BANK OF LOUISVILLE, - - - - - *Third Party-Defendant, Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky.

Filed May 1, 1990

BEFORE: KENNEDY and RYAN, Circuit Judges; and SMITH, District Judge.*

RYAN, Circuit Judge. Third-party plaintiff-appellant, Black Crystal Company, Inc. ("Black Crystal"), appeals

---

*The Honorable George C. Smith, United States District Judge for the Southern District of Ohio, sitting by designation.

the district court order granting summary judgment for third-party defendant-appellee First National Bank of Louisville ("First National") in this action involving the issuance and nonpayment of a commercial letter of credit ("the Credit").

Because the record reveals no genuine issue of a material fact, the district court correctly granted summary judgment for appellee First National. Thus, we affirm the district court's judgment.

I.

This case involves a commercial letter of credit issued by the City Bank of Taipei. The beneficiary was identified in the letter of credit as "Black Crystal Company, Inc., Export Division." The Credit also identified United Kentucky Bank as the advising bank. First National was the confirming bank. Although the Credit did not specify a negotiating bank, appellant contends that United Kentucky Bank acted as one. Appellee disputes that contention.

Black Crystal claims that First National was liable for payment under the Credit and that First National wrongfully refused to so pay. Appellant raised the following issues on appeal:

1. Whether the Beneficiary did meet the expiration date of July 10, 1981 so as to be in a position to demand payment under the letter of credit.
2. Whether the Beneficiary presented the documents to a bank in a position to accept the documents and accept responsibility as a negotiating bank.
3. Whether the Beneficiary did fulfill the terms and conditions of the letter of credit.
4. Whether the dishonor of the letter by the bank which had undertaken to confirm, First National Bank, was wrongful.

5. Whether the dishonor was entirely the fault of First National Bank, or whether other parties, including United Kentucky Bank, Bank of California International etc. shared some responsibility.
6. What was the effect of "Amendment 9" i.e. was it a true amendment?
7. Was "Amendment 9" wrongful in itself, and the result of negligence or deliberate interference with the transaction?
8. Given the conflicts of the testimony and interpretations of factual developments in the case, was summary judgment a proper remedy?

II.

A court deciding a motion for summary judgment must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

> "[O]n a motion for summary judgment the movant has the burden of showing *conclusively* that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."

Blakeman v. *Mead Containers*, 779 F. 2d 1146, 1150 (6th Cir. 1985), *quoting Smith* v. *Hudson*, 600 F. 2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

Appellant argues that summary judgment was inappropriate in this case because "the facts are immensely in dispute." Appellant claims that it timely submitted the docu-

ments required by the Credit to United Kentucky Bank, a bank claimed by appellant to be a negotiating bank. The record does not support appellant's claims.

After carefully examining the record, we conclude that summary judgment for appellee was appropriate because there is no genuine issue as to any *material* fact.

Finally, appellant argues that the District Court erred in failing to consider the application of appellant's waiver and estoppel theories. Appellant contends that because the United Kentucky Bank did not notify Black Crystal of any problems when the documents were presented to and accepted by Hassanain on July 10, the fact that First National refused to accept them after the expiry date can have no effect on Black Crystal's right to payment. However, appellant's argument assumes that United Kentucky Bank acted as a negotiator of the letter of credit when in fact it did not. The undisputed testimony of the Kentucky Bank's officer, who was responsible for dealing with Black Crystal's affairs, was that at no time did United Kentucky Bank negotiate the letter of credit.

For the reasons fully detailed by the district court in its well-written opinion which we fully adopt as though it were our own, we AFFIRM.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 82-350L(J)

TRANSPORTATION MANAGEMENT & CONSULTING, INC., et al., - - - - *Plaintiffs,*

v.

BLACK CRYSTAL CO., INC., et al., - - *Defendants.*

MEMORANDUM OPINION—Entered May 16, 1988

This case presents the court with a veritable Augean stable of questions concerning the issuance and payment of a letter of credit issued as part of a contract between Black Crystal Coal Company of San Francisco, California (hereinafter Black Crystal) and Lucky Cement Corporation, of Taiwan (hereinafter Lucky Cement). Before the court are First National Bank of Louisville's Motion for Summary Judgment on Black Crystal's Third Party Complaint and Black Crystal's Motion for Summary Judgment on its Third Party Complaint. Jurisdiction is proper under 28 U.S.C. § 1332.

I. FACTS

On or about January 30, 1981, Lucky Cement Corporation of Taipei, Taiwan contracted with Black Crystal Coal Company for the purchase and sale of more than 126,000 metric tons of steaming coal. The coal was to be shipped in five shipments of from 25,000 to 26,400 metric tons from the United States to Taiwan. As part of their agreement,

Lucky Cement had an irrevocable, negotiable letter of credit (hereinafter referred to as the Credit) in the amount of $1,784,640.00 issued for the benefit of Black Crystal by the City Bank of Taipei (hereinafter Taipeibank).

On or about February 18, 1981 the Credit was sent by tested telex to First National Bank of Louisville in Louisville, Kentucky (hereinafter First National). The Credit expressly designated the Bank of California International as the reimbursing bank and the United Kentucky Bank (hereinafter UKB) as an advising bank, but did not designate a negotiating bank. The final shipping date set forth was March 19, 1981 and the expiration date was March 29, 1981. The Credit provided for payment of drafts if accompanied by certain commercial invoices, Ocean Bills of Lading, an Order of the City Bank of Taipei, a Certificate of Origin, a Certificate of Inspection Analysis and Weight, a Certificate from the beneficiary, and an Original Suppliers Certificate. As a final matter, the telex stated that it was "subject to" the Uniform Customs and Practices for Documentary Credits, International Chamber of Commerce Publication 290 (hereinafter abbreviated UCP.)[1]

---

[1]The Credit telex provided as follows:

FIRST NATIONAL BANK OF LOUISVILLE
LOUISVILLE, KENTUCKY
USA

TEST:——
PLS ADVISE THRU UNITED KENTUCKY BANK
LOUISVILLE
WE OPEN IRREVOCABLE CREDIT 0TH2/00790/UO
BENEFICIARY BLACK CRYSTAL COMPANY INC. EXPORT DIV 1144 CLAY STREET
SAN FRANCISCO CALIF 94100 USA
ACCOUNTEE LUCKY CEMENT CORP 8TH FL
95 SHIN LIN FU-KUO RD TAIPEI

(Continued on following page.)

(Continued from preceding page.)

TAIWAN REPUBLIC OF CHINA
AMOUNT USDLS $1,784,640.00
COVERING 26,400 MT AMERICAN STEAMING COAL IN BULK AT SELLER'S OPTION, AT USDL $67.60 PER METRIC TON CANDF SUAO FREE OUT LATEST SHIPPING MAR 19 1981 EXPIRY MAR 29 1981
SHIPMENT FROM NEW ORLEANS TO SUAO
PARTIAL SHIPMENTS ALLOWED TRANSHIPMENT PROHIBITED
AVAILABLE AGAINST BENEFICIARY'S DRAFT(S) DRAWN ON US AT 180 DAYS AFTER SIGHT FOR FULL INVOICE COST ACCOMPANIED BY THE FOLLOWING DOCTS:
SIGNED COMMERCIAL INVOICE IN QUINTUPLICATE INDICATING IMPORT PERMIT NO. 69RC1-008859B
FULL SET OF CLEAN ON BOARD OCEAN BLLS OF LADING MADE OUT TO THE ORDER OF CITY BANK OF TAIPEI TAIPEI MARKED FREIGHT PREPAID NOTIFY BUYER
CERTIFICATE OF ORIGIN IN TRIPLICATE ISSUED BY GOVERNMENTAL AUTHORITY
THE CERTIFICATE OF INSPECTION ANALYSIS AND WEIGHT IN QUINTRIPLICATE ISSUED BY COMMERCIAL TESTING CO.
BENEFICIARIES' CERTIFICATE STATING THAT DUPLICATE SET OF THE ABOVE DOCUMENTS HAS BEEN AIRMAILED BY REGISTERED EXPRESS MAIL DIRECTLY TO THE BUYER BY BENEFICIARY WITHIN 3 DAYS AFTER THE SHIPMENT IS EFFECTED
ONE ORIGINAL SUPPLIERS CERTIFICATE (BLANK FORM AIRMAILING)
ALL BANKING CHARGES OUTSIDE TAIWAN ARE FOR A/C OF BENEFICIARY
THE USANCE DRAFT(S) DRAWN HEREUNDER ARE NEGOTIABLE ON A SIGHT BASIS WITH DISCOUNT CHARGES AND ACCEPTANCE COMMISSIONS FOR BUYER'S A/C

(Continued on following page.)

(Continued from preceding page.)

SPECIAL INSTRUCTIONS:

1) CHARTER PARTY D/L IS ACCEPTABLE

2) T/T REIMBURSEMENT CERTIFYING COMPLIANCE IS ACCEPTABLE

3) WITHIN 10 DAYS AFTER RECEIPT OF THIS L/C ADVICE, BENEFICIARY MUST ESTABLISH A LETTER OF GUARANTEE OR STAND-BY L/C FOR USDLS $3,460.00 VIA ADVISING BANK AS PERFORMANCE BOND TO CITY BANK OF TAIPEI TAIPEI THIS L/C OR L/G SHALL BE RELEASED WITHOUT INTEREST AFTER THE CONTRACTED COMMODITY HAS ARRIVED IN TAIWAN AND HAS BEEN FOUND TO BE IN ACCEPTABLE CONDITION, AND SELLER'S PAYMENT MADE TO THE BUYER OF DESPATCH MONEY AND PENALTY WHICH WILL BE NOTICED BY BUYER THROUGH THE ISSUING BANK

TO THE NEGOTIATING BANK ONLY: UPON NEGOTIATION OF THE DRAFT DRAWN UNDER THIS CREDIT PLS CABLE US OF THE AMOUNT NEGOTIATED FOR REIMBURSEMENT, PLS DRAW AT SIGHT ON THE BANK OF CALIF INTL NEW YORK FOR THE FACE AMOUNT OF THE DRAFT UPON NEGOTIATION CERTIFYING IN COMPLIANCE WITH THE CREDIT TERMS AND CONDITIONS

ALL DOCUMENTS ARE TO BE DESPATCHED IN TWO SETS BY CONSECUTIVE AIRMAILS TO THE ISSUING BANK

WE UNDERTAKE THAT DRAFTS DRAWN AND PRESENTED IN CONFORMITY WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED SUBJECT TO UCP FOR DOCUMENTARY CREDIT (1974 REVISION) INTL CHAMBER OF COMMERCE BROCHURE NO 290

TAIPEIBANK

After the Credit was opened, Black Crystal used it to finance the mining, trucking, testing and transportation of the coal called for in the Lucky Cement/Black Crystal contract by assigning rights to proceeds from the Credit to the various mining, trucking and barging companies involved. Despite Black Crystal's efforts and arrangements however, it was unable to meet the March 1981 contract dates. Accordingly, Black Crystal requested and received four extensions of its performance dates and four corresponding extensions of the Credit's shipping and expiration dates in Amendments 6, 7, 8, and 10 to the Credit. Under the terms of Amendment 10, the shipping date was extended to June 30, 1981 and the Credit's expiration date was extended to July 10, 1981.

At some point, Black Crystal found it desirable or necessary to have its Credit confirmed by another bank. To this end, on May 25, 1981, Black Crystal sent a telex to First National asking First National to notify Taipeibank that Black Crystal wanted the Credit confirmed. First National sent a telex on behalf of Black Crystal to Taipeibank reciting Black Crystal's request. Two days later, on May 27, 1981, First National, on its own behalf, sent another telex to Taipeibank requesting authorization to confirm. The First National telex stated in part

> Please authorize us by tested telex to confirm this letter of credit.
>
> Also please amend L/C to read 'available against beneficiary's draft(s) drawn on First National Bank of Louisville, Kentucky at 180 days after sight for full invoice cost.'

On May 28, 1981 Taipeibank, by telex, agreed to a confirmation of the Credit and authorized First National to confirm, but stated that "all other terms and conditions remain unchanged."

On May 29, 1981, First National confirmed the Credit in Amendment 9. In that Amendment First National stated:

> We confirm this Credit and thereby undertake that all drafts drawn and presented to First National Bank of Louisville by United Kentucky Bank, International Dept., P.O. Box 34000, Louisville, Kentucky 40232, on behalf of the beneficiary of this Credit in conformity with the terms of this Credit will be duly honored by First National of Louisville if all terms and conditions of this Credit have been met and as soon as First National Bank of Louisville has been reimbursed by the Bank of California International, New York for face amount of the draft in available funds. First National Bank of Louisville will then paid (sic.) in available funds to United Kentucky Bank the amount of any drawing less First National Bank of Louisville's fee for United Kentucky Bank to disburse proceeds to the beneficiary and/or their assignees if any.

This amendment was signed by representatives of UKB and Black Crystal.

The same day that First National confirmed the Credit, the first shipment of coal mined for the Black Crystal/Lucky Cement contract was beginning to be loaded on river barges at the Lyon County Coal Terminal in Kentucky. All did not go smoothly. There was some dispute with the Lyon County Coal Terminal concerning payment of terminal charges and loading was delayed. On June 10, after approximately 6 barges had been loaded, Black Crystal transfered loading operations to Reid Quarry, where the remainder of the coal was loaded on 10 more barges and all 16 were sent downstream to New Orleans, Louisiana. The 16 barges of coal arrived in New Orleans for mid-

stream stevedoring and loading to vessel around June 23, 1981.

At some point prior to the coal's arrival in New Orleans, Black Crystal entered negotiations with Cerbere & Co., Ltd. (hereinafter Cerbere) for ocean transportation of the coal to Suao, Taiwan on board the ship EASTERN HORNET. Cerbere agreed to ship the coal and accept an assignment of proceeds for ocean freight charges, provided a proper key tested telex was sent from a confirming bank to Cerbere's bank, Banco Urquijo, authenticating Black Crystal's Credit. Apparently Black Crystal asked First National to send an authenticating telex to Banco Urquijo, but no such telex was sent. Thereafter, in late June, 1981, Cerbere threatened to cancel its arrangement with Black Crystal because the no telex had been sent to Banco Urquijo. Cerbere gave Black Crystal until June 29, 1981 to send a telex.

On June 29, 1981, First National contacted Cerbere concerning Black Crystal's credit. Evidently there was some difficulty, misunderstanding or disagreement between Cerbere and First National because First National apparently never sent the requested telex to Banco Urquijo. Black Crystal alleges that as a direct consequence of First National's actions, charter party negotiations between Black Crystal and Cerbere ended on June 29, 1981. After the break up of negotiations with Cerbere, Black Crystal arranged transportation of the coal by spot chartering the ship SAN NICHOLAS from Anteres Shipping and Trading Corporation. The Charter Party agreement for the transportation of the coal aboard the SAN NICHOLAS was signed in San Francisco on June 30, 1981.

On July 9 and 10, 1981, the coal was loaded aboard the SAN NICHOLAS. Youssef Ali Hassanain (Hassanain), an officer of UKB from Louisville, Kentucky, was in New Orleans to observe the loading and to receive the bills of lading and other documents relating to the coal. After

the coal was loaded on board the SAN NICHOLAS, Hassanain took the bills of lading and other documents and returned to Louisville. He testified at a deposition that when he returned to Louisville from New Orleans, he had all the documents that were required to be used in the negotiation of the Credit.

Black Crystal claims that thereafter, on July 12 and 13, 1981, Hassanain prepared and mailed two sets of the documents required by the Credit to Taipeibank and First National. In these mailings Hassanain allegedly certified that he had all the documents in satisfaction of the Credit's terms and conditions and requested payment be wired to UKB. First National disputes this, and claims that neither the documents required by the Credit nor a draft drawn on the Credit was ever actually presented to First National for payment. In any case, on July 13, 1981, a First National representative told Hassanain that no extension to the Credit's expiration date had been received and that the Credit had expired on July 10. First National refused to honor UKB's draft and never paid any draft drawn on the Credit.

On July 17, 1981 the Bank of California received a telex from Taipeibank instructing the Bank of California not to pay any reimbursement requested under the Credit. The telex went on to state that payment should be made "only upon receipt of our further instructions." On July 20, 1981 the Bank of California received another telex from Taipeibank requesting that the Bank of California confirm the receipt of the July 17 message and asking the Bank of California whether it had paid under the Credit. The Bank of California responded by telex that it had not received a reimbursement claim to that time and that it would inform Taipeibank upon receiving a demand and before paying.

On July 27, 1981 representatives of UKB and Black Crystal visited the New York office of the Bank of California and delivered documents intended to be in satisfaction of the terms and conditions of the Credit. The Bank of California examined the documents, found discrepancies, and refused to pay. A Black Crystal representative returned to the Bank of California's offices on July 28, 1981 with proposed amendments, but the Bank of California still refused to pay. The Bank of California sent a telex to UKB on July 29, 1981 enumerating the discrepancies in the documents and calling attention to the instructions from Taipeibank not to pay. The Bank of California was never authorized to and never made any payment under the Credit.

Meanwhile, the coal which was loaded on board the San-Nicholas in New Orleans had been transported across the ocean to a point off the coast of Taiwan. Once there however, the coal was not unloaded. Allegedly, the ocean shippers refused to unload the coal until they were paid. Since payment was not forthcoming, they apparently disposed of the coal at a port in Korea.

In 1982 the inland and ocean-going shippers of the coal instituted this suit against Black Crystal and UKB. Black Crystal filed a Third Party Complaint against First National.

II. NATURE OF THE TRANSACTION

The court must begin analysis of this matter by noting some uncertainty about the legal nature of the transactions and relationships at issue here. Some authorities view letters of credit arrangements as something separate from the traditional contract. *See, e.g., Voest-Alpine Intern. Corp.* v. *Chase Manhattan Bank,* 707 F. 2d 680, 682-83 (2d Cir. 1983); *Bank of Cochin Ltd.* v. *Manufacturers Hanover*

Trust, 612 F. Supp. 1533, 1537 (S.D. N.Y. 1985), *aff'd*, 808 F. 2d 209 (2d Cir. 1986); J. White and R. Summers, Uniform Commercial Code at § 18-2 (2d ed.1980); 1 A. Lowenfeld, International Private Trade § 5.53 at 103 (1977). Other authorities have viewed letters of credit as executory unilateral contracts, to which general contract principles are applicable. *See, e.g., Union Planters National Bank* v. *World Energy Systems*, 816 F. 2d 1092, 1098 (6th Cir. 1987); *Bank-of North Carolina, N.A.* v. *Rock Island Bank*, 570 F. 2d 202, 207 (7th Cir. 1978); *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F. 2d 461, 465-66 (2d Cir. 1970); *Transparent Products* v. *Paysaver Credit Union*, 198 U.S. Dist. LEXIS 605 (N.D. Ill., Jan. 21, 1988); *Worldwide Sugar Co.* v. *Royal Bank of Canada*, 609 F. Supp. 19, 23-24 (S.D. N.Y. 1984); *Consolidated Aluminum Corp.* v. *Bank of Virginia*, 544 F. Supp. 386, 395 (D. Md. 1982), *aff'd*, 704 F. 2d 136 (2d Cir. 1983).

Regardless of the legal description of the parties' relationships in this case, this court is bound to apply the terms of the letter of credit as it was agreed to by the parties. Consequently, the court must refrain from injecting its own views into the parties' agreements or from remaking the agreements which they have freely entered. With these general principles in mind the court will consider the rights and obligations of the parties under the Credit, under First National's confirmation of the Credit, under Article 41 of the UCP, and under UKB's negotiation of the Credit.

III. RIGHTS AND OBLIGATIONS UNDER THE CREDIT

The Credit in this case was issued on or about February 18, 1981 by Taipeibank on behalf of its customer, Lucky Cement. The Credit expressly stated that it was "subject to" the UCP. Black Crystal argues that this provision precludes the application of Article 5 of the Uniform Com-

mercial Code[2] (hereinafter the UCC) to the parties' relationships. First National disagree. Because there is little or no substantive difference between the rights and obligations imposed by the UCC and the UCP to the relationships considered here, the court need not choose between the UCC and the UCP to resolve this matter.

A letter of credit is purely a transaction in documents. *See Banco Nacional de Desarrollo* v. *Mellon Bank, N.A.*, 726 F. 2d 87, 91 (3d Cir. 1984); *Chase Manhattan Bank* v. *Equibank*, 550 F. 2d 882, 885 (3d Cir. 1977); *Courtaulds North America, Inc.* v. *North Carolina National Bank*, 528 F. 2d 802, 805-06 (4th Cir. 1975); UCP Art. 8(a). In the typical letter of credit transaction an issuing bank draws a letter of credit in favor of a beneficiary for the payment of money upon presentation of certain documents prepared for the issuing bank's customer pursuant to a contract between the customer and the beneficiary. *See* Ky. Rev. Stat. § 355.5-103(1)(a); UCP General Provisions and Definitions b. In essence therefore, a letter of credit is an engagement by the issuing bank for the purchase of the documents specified in the letter of credit. *See Equibank, supra*, at 885.

In such an arrangement the issuing bank has the obligation to pay *only* upon a presentation made in accord with the terms of the letter of credit. *See Union Planters National Bank* v. *World Energy Systems*, 816 F. 2d 1092, 1098 (6th Cir. 1987); Ky. Rev. Stat. § 355.5-114(1); UCP Art. 3(a). Upon proper presentation, the beneficiary has the right to collect payment from the issuing bank and the issuing bank has the corresponding right to collect from its customer any sums paid under the credit. See Ky. Rev. Stat. § 355.5-114(3). Before the issuing bank may pay or the

---

[2]Article 5 of the Uniform Commercial Code is enacted in Kentucky as Ky. Rev. Stat. § 355.5-101 *et seq.*

beneficiary collect, the issuing bank has the duty to ensure that the presentation strictly conforms to the terms of the letter of credit.[3] *See* KY. REV. STAT. § 355.5-109(2); UCP Art. 7. In the absence of strict conformity, the beneficiary cannot force payment and the bank pays at its peril. *See Equibank, supra* at 886. In the case of the documents required by the letter of credit, this means the issuing bank has the right to examine them to "ascertain that on their face they appear to comply with the terms of the credit." KY. REV. STAT. § 355.5-109(2); *accord* UCP Arts. 7 and 8. If the documents do not strictly comply with the terms and conditions contained in the letter of credit, an issuing bank is not required to pay the draft presented. *See Board of Trade of San Francisco* v. *Swiss Credit Bank*, 728 F. 2d 1241, 1243 (9th Cir. 1984); *Banco Nacional de Desarrollo* v. *Mellon Bank, N.A.*, 726 F. 2d 87, 91 (3d Cir. 1984); *Voest-Alpine Intern. Corp.* v. *Chase Manhattan Bank*, 707 F. 2d 680, 682-83 (2d Cir. 1983); *Courtaulds North America, Inc.* v. *North Carolina National Bank*, 528 F. 2d 802, 806 (4th Cir. 1975); *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F. 2d 461, 464-65 (2d Cir. 1970).

The issuing bank also has the right to insist that a beneficiary strictly comply with any time restrictions in the letter of credit. The time restrictions placed upon the beneficiary are perhaps the most important and material requirements affecting the parties' rights since they fix

---

[3]Whether a letter of credit beneficiary is held to a standard of strict compliance is a matter of local law. *Tosco Corp.* v. *FDIC*, 723 F. 2d 1241 (6th Cir. 1983). Nothing in the UCC or the UCP indicates that the strict compliance rule should not be followed in letters of credit "subject to" the UCP. Although there is no Kentucky case law on this point, Kentucky would probably follow the majority rule requiring strict compliance with the terms of credit. *Cf. UTICA Mut. Ins. Co.* v. *Walker*, 725 S.W. 2d 24, 26 (Ky. Ct. App. 1987) (applying New York law).

with certainty the liability of the issuing bank. *See Consolidated Aluminum Corp.* v. *Bank of Virginia*, 554 F. Supp. 386, 397 (D. Md. 1982), *aff'd*, 704 F. 2d 136 (2d Cir. 1983); *Bank of America National Trust and Savings Ass'n* v. *Liberty National Bank and Trust Co.*, 218 F. 2d 831, 840-41 (10th Cir. 1955) ("[W]here a date is fixed in a letter of credit for its expiration, such provision becomes an important condition, and there must be strict compliance with it before there can be liability on the part of a bank issuing the letter."). *See also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W. 2d 185, 187 (Tex. Civ. App. 1980). Consequently, the issuing bank has the right to insist that the beneficiary of a letter of credit present the required documents prior to the expiration of the letter of credit or demonstrate that he could have presented them in a timely fashion but was unjustifiably prevented from doing so. *See Consolidated Aluminum, supra* at 391-92; *North American Foreign Trading Corp.* v. *General Electronics Ltd.*, 413 N.Y.S. 2d 700, 26 U.C.C.R.S. 168, 171 (N.Y. App. Div. 1979); *see also* Ky. Rev. Stat. § 355.3-511; UCP Arts. 11 and 39. If the documents are not presented on time, the issuing bank's obligations end at the expiration date and the issuing bank need not pay a draft on the letter of credit. *See Consolidated Aluminum, supra,* at 397-98; *Hyland Hills Metropolitan Park and Recreational District* v. *McCoy Enterprises, Inc.*, 554 P. 2d 708, 20 U.C.C.R.S. 488, 491 (Colo. Ct. App. 1976).

In this case the Credit was an engagement between Taipeibank (the issuing bank) and Black Crystal (the beneficiary), for the payment of money upon the proper presentation of certain documents (bills of lading, etc.) prepared at the behest of Lucky Cement (Taipeibank's customer) pursuant to the terms of the Lucky Cement/Black Crystal coal contract of January 30, 1981. In its position as issuing bank, Taipeibank had the right and obligation to inspect

the documents presented and to require strict adherence to all of the Credit's terms, including the expiration date.

IV. RIGHTS AND OBLIGATIONS UNDER THE CONFIRMATION

On May 29, 1981, pursuant to the request and authorization of Taipeibank, First National "confirmed" Black Crystal's Credit (hereinafter referred to as the Confirmation). In so doing, First National assumed the position of a "confirming bank" under both the UCC and the UCP.

A confiming bank "is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank." KY. REV. STAT. § 355.5-103(1)(f); *accord* UCP Art. 3(b). Thus, a confirming bank essentially assumes the obligations of an issuing bank as to the Credit confirmed. *See* KY. REV. STAT. § 355.5-107(2) and comment; UCP Art. 3(b).[4] However, the obligations that a confirming bank assumes need not exactly mirror the issuing bank's obligations under the letter of credit.

---

[4]In the present case First National generally assumed the rights and duties of Taipeibank as to the Credit when it confirmed the Credit. Thus, as discussed above, First National had the duty to pay according to the Credit "provided that the terms and conditions of the Credit are complied with." *See* UCP Art. 3(b); KY. REV. STAT. § 355.5-109. Additionally, First National, like Taipeibank, had the right and duty to examine all documents presented with reasonable care upon presentation to determine that they conformed to the conditions of the credit. *See Seattle-First Nat. Bank* v. *F.D.I.C.*, 619 F. Supp. 1351, 1362 (D.C. Ok. 1985); KY. REV. STAT. § 355.5-109(2); UCP Arts. 7. Upon proper presentation and payment of a Credit draft, First National had the right to reimbursement from its customer, Taipeibank. KY. REV. STAT. 355.5-114(3).

A confirmation is a separate engagement, independent from the letter of credit which it confirms. The obligations created by a confirmation are distinct from the issuing bank's obligations on the letter of credit. Consequently, the terms of a confirmation generally do not affect the obligations running between the issuing bank and the beneficiary—they merely add another, parallel set of obligations into the milieu. *See* UCP 3(b); KY. REV. STAT. § 355.5-107(2), and comment. Both the UCC and the UCP allow the parties to restrict these obligations and rights by agreement. *See* UCP General Provisions (a)[5]; KY. REV. STAT. § 355.5-107(2).[6] Such a restricted confirmation is not necessarily an amendment of the letter of credit.

In the present case, First National confirmed Taipeibank's Credit in Amendment 9 thereto. The Confirmation contained terms and conditions slightly at variance with the original Credit. Specifically, the Confirmation stated that First National would pay under the Credit *only* 1) on payment of $2,000 of "confirmation fees", 2) on drafts presented by United Kentucky Bank, 3) on drafts in conformity with the terms of the Credit, and 4) upon reimbursement by the Bank of California International. These varying terms did not serve to alter the Credit, but created a separate, parallel obligation on the part of First National to pay, provided that the Confirmation's terms and condi-

---

[5]UCP General Principles and Definitions (a) states:

> These provisions and definitions in the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

[6]Section 355.5-102(2) provides in pertinent part:

> A confirming bank . . . becomes directly obligated on the credit *to the extent of its confirmation* as though it were an issuer.

KY. REV. STAT. § 355.5-102(2) (emphasis added).

tions were met. The Confirmation was assented to by Bryan Perry (Perry), a Black Crystal vice president. Black Crystal now claims that Perry did not understand the Confirmation and that he did not have the authority to agree to the Confirmation on behalf of Black Crystal. *See* Black Crystal's Reply Memorandum in Support of its Motion for Summary Judgment against First National Bank at 17-19. Although this is a dispute of fact, it is not material to the resolution of this case.

If Perry were without authority to assent to the Confirmation, then the Confirmation was presumably ineffective. If the Confirmation was ineffective, then First National did not "confirm" the Credit within the meaning of the UCC and the UCP and was not obliged to pay according to the Confirmation. Therefore, First National had no obligation to honor UKB's presentation of documents and demand for payment, whenever it was made. On the other hand, if Perry did have authorty to assent then First National did "confirm" the Credit and was obliged to pay according to the Confirmation's terms. One of those terms was that all the terms and conditions of the Credit had to be met before First National would pay. First National had the right to insist that this term be strictly complied with. The undisputed facts reveal however, that Black Crystal did not meet all of the terms of the Credit.

The Confirmation set June 30, 1981 as the final date for shipping the coal, and July 10, 1981 as the expiration date of the Credit. Black Crystal admits that the coal was not loaded for ocean shipping until July 9-10, 1981 and was shipped thereafter. Additionally, Black Crystal admits that it presented the documents and draft required by the Credit on or about July 13, 1981, three days after the Credit's expiration. Thus, the coal was shipped and the presentment was made after the deadline set for each. Because Black Crystal did not meet either these deadlines,

First National was within its rights in refusing to honor UKB's demand for payment.

Black Crystal implicitly argues that it was unjustifyably prevented from meeting the shipping and expiration dates in the Credit as a direct result of First National's failure to send an authenticating telex to Banco Urquijo. The court cannot agree. First National was under no obligation to send or receive telexes for or on behalf of Black Crystal. *See* Ky. Rev. Stat. § 355.5-107(4); UCP Art. 10. Black Crystal offers no proof that First National ever promised to send such a telex. Therefore, First National was justifiably within its rights in failing or refusing to send such a telex. Black Crystal offers no other proof that would justify its failure to meet the Credit dates, such as proof that First National maliciously or in bad faith failed to send the telex. *See* Ky. Rev. Stat. § 355.5-109(1). In the absence of such evidence, First National cannot be held liable for the problems between Black Crystal and its shipper which may have caused Black Crystal to miss the Credit deadlines. *See* Ky. Rev. Stat. § 355.5-109(1)(b).

V. RIGHTS UNDER UCP ARTICLE 41 AND THE TIME FOR PRESENTATION

Black Crystal alleges that UCP Article 41 gave Black Crystal 21 days after July 10, 1981 to present the documents and a draft. The court cannot agree. Article 41 provides:

> Notwithstanding the requirement of Article 37 that every credit must stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented

> to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

U.C.P. Art. 41. Black Crystal bases its argument on the fact that the Credit does not particularly state at time period after the date of issuance of the bills of lading during which any required documents were to be presented for payment, acceptance or negotiation. While this is true, nothing in Article 41 indicates that the 21 day period extends past the expiration date of a letter of credit. Indeed, the International Chamber of Commerce Banking Commission has determined that Art. 41 does not extend the time for presentation beyond the expiration date of a letter of credit. *See* Decisions of the ICC Banking Commission (1975-1979) International Chamber of Commerce Publication No. 371 at 82.[7]

VI. RIGHTS AND OBLIGATIONS UPON NEGOTIATION OF THE CREDIT

Finally, Black Crystal asserts that on July 13, 1981, First National had an absolute obligation to pay Black Crystal's draft. Black Crystal premises this conclusion on the grounds that the Credit was "freely negotiable," meaning that Black Crystal could negotiate a draft on the Credit to any bank Black Crystal selected. *See* UCP General Provisions and Definitions e. Black Crystal asserts that it selected UKB as the negotiating bank and that UKB's receiving, reviewing and approving all of the docu-

---

[7]The Banking Commission agreed that

> If the credit does not stipulate a period of time, documents will be refused if they are presented later than twenty-one (21) days after the date of issuance of the shipping documents (or, of course, if the credit expires during such period of twenty-one (21) days, if they are presented after the expiry date of the credit).

ments presented by Black Crystal amounted to negotiation, as a matter of law. Relying on UCP Article 13, Black Crystal then argues that once the documents were negotiated that Black Crystal had fulfilled its contractual obligations under the Credit. At that point, Black Crystal concludes, Black Crystal had the right to payment and First National had the obligation to pay. Under Black Crystal's theory, upon negotiation, First National no longer had the right to inspect the documents presented for discrepancies, nor the right to refuse payment of a Credit draft on the basis of any variance with the terms of the Credit. In Black Crystal's view, these rights and duties fell to UKB as the negotiating bank. The court cannot agree.

First, the court can find no support for Black Crystal's position in the case law or legal treatises dealing with the UCC or the UCP or the law of documentary credits generally. Second, the court can find no specific support for Black Crystal's position in UCP Article 13. UCP Art. 13 provides in pertinent part:

> A . . . negotiating bank which has been authorized to claim reimbursement from a third bank nominated by the issuing bank and which has effected such . . . negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and condition of the credit.

UCP Art. 13. The apparent purpose behind UCP Article 13 was to take a "reimbursing bank" out of conflicts between the negotiating bank and the issuing bank over proper payment of a letter of credit. According to the ICC Banking Commission, such matters are "of concern only to the issuing bank and the negotiating bank." *See* Decisions of the ICC Banking Commission (1975-79), International Chamber of Commerce Publication No. 371 at 32-3.

In the Credit in this case, the only "third bank nominated by the issuing bank" as a "reimbursing bank" was the Bank of California. First National was not designated a reimbursing bank in the Credit, and never acted as such as to the Credit. Consequently, Art. 13 does not by its terms apply to First National's position in this case. First National, as discussed above, was a confirming bank, and under its Confirmation it had the obligation to pay only upon presentation of a draft by UKB which was in conformity with the Credit. Moreover, First National had not only the right, but the duty to its customer, Taipeibank, to inspect the documents before payment and to insist upon strict compliance with the terms of the Credit, including adherence to the stated shipping and expiration dates. Neither Article 13 nor negotiation of the Credit absolved First National of these rights.

For the foregoing reasons, this court concludes that First National properly refused to pay any draft presented by UKB or Black Crystal on the Credit which expired on July 10, 1981.

An appropriate Order will accompany this Memorandum Opinion.

Dated 5 - 11 - 88

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Judge